SUPREME COURT, U. S.

73-925

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. ~~72-2028~~

UNITED STATES OF AMERICA, ~~Plaintiff~~-*Respondent*

vs.

CARLTON ELLIS ALLISON, BILLY RAY HOLLADAY,
RALPH M. MARQUEZ, CURTIS ALDREDGE PERRY,
MICHAEL MARQUEZ, ~~Defendants~~-*Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, *Plaintiff-Respondent*

vs.

CARLTON ELLIS ALLISON, BILLY RAY HOLLADAY, RALPH M. MARQUEZ, CURTIS ALDREDGE PERRY, MICHAEL MARQUEZ, *Defendants-Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the entitled case on November 13, 1973.

OPINIONS BELOW

The opinions of the Court of Appeals are not yet reported. The first opinion of the Court of Appeals, rendered July 13, 1973, remanded the case to the Trial Court for an evidentiary hearing to determine if there was a reasonable possibility that

the presence of an alternate juror during the jury's deliberations affected the jury's verdict. The subsequent opinion of the Court of Appeals, rendered November 13, 1973, affirmed a judgment of conviction of Petitioners of substantive violations of the Dyer Act, Tit. 18 U.S.C. Section 2312, 2313, and of conspiracy in violation of Tit. 18 U.S.C. Section 371. Both opinions of the Court of Appeals appear in Appendix A, infra.

JURISDICTION

There is no opinion of the District Court.

The judgment of the Circuit Court of Appeals was entered on November 13, 1973. The jurisdiction of this Court is involved under Tit. 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a Federal Trial Judge may permit an alternate juror to retire to the juryroom and to remain there with twelve regular jurors during deliberation.

STATEMENT OF THE CASE

This criminal case originated with the filing of an indictment against Petitioners, CARLTON ELLIS ALLISON, BILLY RAY HOLLADAY, RALPH M. MARQUEZ, CURTIS ALDREDGE PERRY, MICHAEL MARQUEZ, and others, by a Grand Jury organized in the United States District Court for the Northern District of Alabama. The indictment charged all Defendants in Count One with conspiracy to violate Tit. 18, U. S. Code, Sections 2312 and 2313. The indictment further charged each Defendant in separate counts with substantive violations.

Thereafter, each Petitioner entered a plea of "not guilty" and the cause came on to be heard on July 17, 1972. A jury was struck, two alternates selected and trial commenced. On August

4, 1972, a verdict of guilty was returned against all parties. Subsequently, each Petitioner was sentenced to a term of years in Federal prison.

At the conclusion of the evidence on August 3, 1972, and after arguments of counsel, proceedings were in recess until the following morning at which time the Court was to charge the jury. Upon the Court reconvening at 9:00 A.M., August 4, 1972, counsel for Defendants and the U. S. Attorney were called into chambers whereupon the Court informed the lawyers that a member of the jury, one Mr. Finch, was sick and his ability to continue was uncertain. The Court then outlined the available courses as follows:

> *The COURT: I would like to do this, I hate for him to fall out on us in the middle of the morning or middle of the deliberations or anything. And instead of excusing the alternate juror, or I can follow two courses, and I'm not sure which would be best. I can excuse him and hold him away from everybody and away from the jury just in case we need him. And I think this is maybe the best procedure. I can instruct him and the jury that he is going to sit in the juryroom just in case he is needed. But that he is not to in any way participate in any of the deliberations. That he is to have nothing to say. Just sit there. Or I can get a stipulation out of all of the lawyers that they will agree to proceed or allow the jury to proceed with their deliberation so long as eleven jurors remain in the juryroom.*

The Court elected, with no objections from counsel for the Government or counsel for the Defendants, to allow the alternate to sit in with the jury under the charge not to participate in deliberations. Thereafter, proceedings were resumed in Open Court in the presence of the jury and the Defendants where the Court charged the alternate as follows:

> *THE COURT: Now, Mr. Henry, you are the alternate juror in this case. And just in case Mr. Finch is not feeling*

well enough to continue during the morning, I am going to keep you here with the jury. I am required to instruct you and the jury that during the deliberations that you are not to participate in any way. You are not to make any suggestions or you are not to help them in any way. Just be there in case we need you.

The Court orally charged the jury and allowed the jury of twelve to retire along with the alternate juror, Mr. Henry, to begin deliberation. The thirteen persons, twelve jurors and one alternate were in deliberation from 10:20 A.M. until 11:55 A.M. at which time the thirteen were excused to go to lunch. The alternate returned from lunch with the jury but was discharged before deliberations began at 1:30 P.M. The guilty verdict was returned against each Defendant at 4:35 P.M. the same day.

REASONS FOR GRANTING THE WRIT

Petitioners present here the fundamental substantial issue which lies at the heart of our entire system of criminal justice, the right to trial by jury. In the present case that issue is narrowed to whether it is permissible to permit thirteen persons to enter and to be present during jury deliberations.

The plethora of cases in the various circuits wherein alternate jurors have not been discharged in accordance with the mandate of Rule 23 (b) have produced irreconcilably conflicting results. Further, the varied and sometimes bizarre application of Rule 23 (b) indicates that the procedure of trying criminal cases by a jury is in serious need of national clarification.

Petitioners first point out a conflict among the circuits on the precise question here involved. Below, Petitioners relied upon the case of *United States v. Virginia Erection Corp.*, 335 F2d 868 (CA4, 1964). In *Virginia Erection*, during the final arguments, one regular juror gave evidence of being ill. Although the juror was possibly well enough to continue, the

Court permitted an alternate juror to retire for deliberation with the jury. Counsel for Defendants and the Government consented to this procedure. Precisely the same events transpired in the present case. The *Virginia Erection Court*, as the Trial Court here, admonished the alternate not to take part in the deliberations. In neither case was the personal consent of the Defendants obtained. The pertinent facts in that case and in the present cases are virtually identical.

The Fourth Circuit in *Virginia Erection*, however, reversed and remanded for a new trial, holding that under the Constitution of the United States, Article III, Sec. 2, cl 3, and the Sixth Amendment, Defendant has an invioable right to trial by jury. The consequential question, what is a jury, was answered with established authority holding a jury to be twelve persons, neither more nor less.

Clearly, under *Patton vs. United States*, 281 US 276, 74 L.Ed 854 (1930), a trial by jury in a criminal case can be waived in writing by the Defendant, with the consent of the prosecuting attorney and approval of the Trial Court. From this general proposition, as applied to the particular facts of *Patton* the Court reached the result that Defendant could not only waive the entire jury, but also could waive a part of the jury and consent to be tried by a jury of fewer than twelve.

In any event, however, the Defendant himself must expressly and intelligently waive his right to trial by exactly twelve persons and proceed with fewer jurors. In the instant case Appellants made no waiver, either expressly or impliedly – in fact they were not even present when the Court selected the procedure to be used. Further, this is a case of thirteen jurors, not *fewer* than twelve. There is no authority whatever, with or without a waiver, for proceeding with more than twelve and there is doubt whether even an express knowing intelligent waiver by the Defendant himself would authorize proceeding with thirteen. In short, because (1) there was no waiver by Defendants and (2) there is no authority for waiver in any event, the question of waiver is not here applicable. Moreover, in *Virginia Erection*, as the present case, there were not

specifically thirteen jurors. There were twelve regular jurors and an alternate whose legal relationship to the jury was that of stranger, although he was present in deliberation at the direction of the Court. Legally he was an intruder present in the juryroom, but without the restrictions and obligations of the oath of the actual jury – he was not *part* of the jury, merely a person assigned to listen and be ready to become a juror if needed, then and only then to assume the obligations and duties of juror. In practical fact, however, he was part of the jury, he had sat with them during trial, eaten with them, visited together with them at recess and over the course of the several day trial been with them constantly. As stated in *United States v. Beasley*, 464 F2d 468 (CA 10, 1972)

> Once the prescribed number of jurors becomes "the jury", then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury and mistrial is necessary. (At 470)

On remand, or as an immediate inquiry as in *Beasley*, questioning jurors under a standard which requires a showing of prejudice is itself a dangerous intrusion into the proceedings of the jury. This is especially true on remand in that approximately one year had passed between the trial and the hearing on remand in the present case. In *Virginia Erection*, as in the present case, the objection is not to overt acts, argument or votes by the alternate, but assuming the alternate obeyed the Court's instructions to remain mute, his facial expression, attitude and demeanor may have had some effect on the jurors which could affect his verdict. Subtle persuasion is recognized as the most dangerous, in part because the person persuaded is unaware of its presence. Petitioners submit that a hearing on remand after the expiration of one year, without the right of cross-examination to Petitioners, or even a hearing immediately following deliberations would not and could not produce reliable evidence of the presence vel non of prejudice. This is simply common sense. Not only might the alternate's actions

have affected the outcome, his mere presence violates the cardinal principle that "deliberations of the jury shall remain private and secret in every case" *Virginia Erection* at 872. *Virginia Erection* is the same case as the present case, but the decision therein is in direct conflict with the decision below in the present case.

In *Beasley*, supra, the alternate was not discharged and simply retired with the jury without instructions. His presence was discovered after a time of deliberation by the jury, and defense counsel moved for a mistrial. The Court conducted a hearing immediately regarding the conduct of the alternate, and found no prejudice. The Tenth Circuit, however, found that even with the immediate hearing a motion for mistrial should have been granted. *Beasley*, then is in conflict in that an evidentiary hearing as to the effect of the jurors is not sufficient to sustain a finding of no prejudice.

In *United States v. Hayutin*, 398 F2d 944 (CA2, 1968), the Trial Court desired to guard against incapacity or disqualification of a regular juror after deliberations had begun. Rather than following the requirement of Rule 24(c) *Federal Rules of the Criminal Procedure*, the alternates were not discharged, but were retained, although they were completely sequestered from the regular jurors. They stayed in a separate room at Court, were conducted by separate marshals sworn and assigned for that purpose, did not eat at the same restaurants or ride in the same conveyance, and slept in a separate hotel. At no time did any alternate enter the juryroom during deliberation. On those facts the Second Circuit affirmed, holding that although Rule 24(c) was mandatory, just as Rule 23(b), there was no prejudice. The Court did specifically consider *Virginia Erection*, and in approving it cited it as standing for the proposition that "there is no rule providing that the Court or the parties, may stipulate for a jury of more than twelve, twelve being the magic number" (at 950).

The Ninth Circuit has considered *Leser vs. United States*, 358 F2d 313 (CA9, 1966). There, an alternate was retained but was sequestered from the jury as in *Hayutin*. Different from

Hayutin, that which was feared came to pass, and a regular juror became disabled after nearly a full day of deliberation. Rather than proceed as provided in Rule 23(b), however, the alternate took the regular juror's place in deliberation and a verdict was reached. The case was affirmed, but not before *Virginia Erection* was considered and approved. Although Appellants feel the result in *Leser* was anomalous, even it was reached by distinguishing the *Leser* facts from those in *Virginia Erection* on two critical points. First, the Court found that there was an express discussion of Rule 24 and the alternatives *with the Defendants*, and *they*, knowingly and intelligently acquiesced to the procedure followed. Second, there at no time was a jury of *more* than twelve, the Court indicating that had that been the case there must be reversal. See also 10 ALR Fed. 204 Section 10, et. seq.

The cases herein cited from the various circuits have also considered the effect of Rules 23(b) and 24(c) *Federal Rules of Criminal Procedure*. Rule 23(b) provides for a jury of less than twelve when the *parties* stipulate in writing with approval of the Court. Rule 24(c) requires the discharge of alternate jurors at the conclusion of the case, and provides for earlier substitution of alternates for regular jurors.

That Defendant may consent to a trial by a jury of less than twelve, but not more than twelve is the logical product of consideration of the nature and the right to trial by jury. Rule 23(b) is merely the formal establishment of that principle which grew from the result in *Patton v. United States.*, supra. It is obviously intended to provide proper procedure in those situations where a juror becomes disabled or disqualified. It is not a suggestion of one alternative, it is the only alternative in cases where the present facts or the *Virginia Erection* facts arise. In this context we find the only unanimity among the circuits. In each case herein cited, except *Patton*, which was decided prior to the existence of the Rules in question, the Courts have held that the Rules are mandatory and any departure therefrom which affects Defendants is error.

CONCLUSION

Petitioners in the case at bar were either tried by a jury of thirteen or by a jury of twelve with one legal stranger in attendance during deliberation. They did not knowingly and intelligently agree to this procedure. The *Federal Rules* of *Criminal Procedure* and the Constitution of the United States Article III and Amendment Six were unequivocally violated by what was done. The Second, Fourth, Ninth, Tenth, and now the Fifth Circuits have had cases regarding these facts. Those cases have reached varied, divergent and conflicting results. The Defendants in this case have been prejudiced.

It is therefore respectfully submitted this Petition for Certiorari be granted.

Respectfully submitted,

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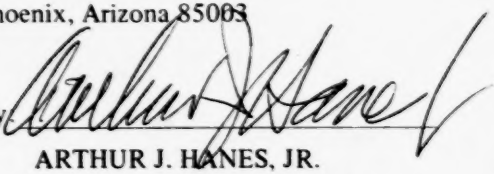
By 
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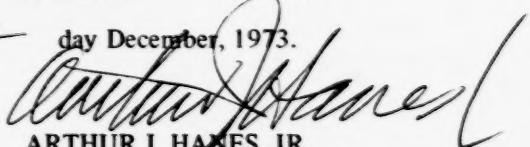
CERTIFICATE OF SERVICE

I, Arthur J. Hanes, Jr., of Counsel for Defendants-Petitioners herein, hereby certify I served the requisite copies of the foregoing Petition for the Petitioners upon the United States Attorney for the Northern District of Alabama, Honorable Al Bowen, and upon the Solicitor General of the United States, and upon Honorable James R. Venalbe, as attorney of Defendants Jerry Ronald Bryant and Donald George Robinson, by depositing the same in the United States mails, first class postage prepaid, and properly addressed to each counsel at his post office address.

This the 12 day December, 1973.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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2828

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARLTON ELLIS ALLISON, BILLY RAY HOLLADAY, RALPH M. MARQUEZ, JERRY RONALD BRYANT, DONALD GEORGE ROBINSON, CURTIS ALDREDGE PERRY, MICHAEL MARQUEZ,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama

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(July 13, 1973)

Before BROWN, Chief Judge, COLEMAN and DYER, Circuit Judges.

DYER, Circuit Judge: The defendants were tried and convicted of substantive violations of the Dyer Act, 18 U.S.C.A. §§ 2312 & 2313, and of conspiracy in violation of 18 U.S.C.A. § 371. The only issue on appeal

deserving in depth consideration is whether a new trial is required because the district court allowed an alternate juror, who had been carefully instructed not to participate in any way in the jury's deliberations, to accompany the twelve regular members of the jury to the juryroom and to remain with them during the first portion of their deliberations until the court could ascertain whether one member of the jury who had been ill the previous night was well enough to continue throughout the jury's entire deliberations. We remand for an evidentiary hearing to determine if there is a reasonable possibility that the presence of the alternate juror during the jury's deliberations affected the jury's verdict.

On August 3, 1972, after the conclusion of evidence and argument of counsel in this three-week trial, the court recessed until 9:00 A.M. on August 4. Upon reconvening it was brought to the court's attention that one of the regular jurors, Finch, had been ill the night before and that his ability to continue was uncertain. Counsel for the defendants and the United States Attorney were called into chambers and informed of the situation. The court explained the alternatives:

> I can excuse him [the alternate] and hold him away from everybody and away from the jury just in case we need him. And I think this is maybe the best procedure. I can instruct him and the jury that he is going to sit in the juryroom just in case he is needed. But that he is not to in any way participate in any of the deliberations. That he is to have nothing to say.

> Just sit there. Or I can get a stipulation out of all the lawyers that they will agree to proceed or allow the jury to proceed with their deliberations so long as eleven jurors remain in the juryroom.

The United States Attorney then suggested that the court excuse Finch and replace him with the alternate, Henry. But the trial judge discarded this suggestion because he did not believe that Finch's "illness right at this time is such that it would justify me substituting the alternate for him."

All of the defendants' attorneys agreed that the best procedure would be to allow the alternate to accompany the jury to the juryroom. No one saw any harm in this procedure since the jury had not been sequestered and since Henry had been with the jury during the entire three-week trial. Indeed, the defense counsel emphasized that they preferred this solution. Additionally, the procedure to be followed was carefully explained a second time by the trial judge in open court in the presence of all of the defendants and their attorneys. The jury and Henry were instructed that Henry was "not to participate in any way. You are not to make any suggestion or you are not to help them in any way. Just be there in case we need you. ... And, of course, you realize that you would not participate in any vote or do anything other than just be available." The jury retired and after 1 1/2 hours of deliberations took a break for lunch. After lunch it became apparent that Finch was feeling somewhat better and was "going to make it," whereupon the al-

ternate juror was immediately discharged. The jury then returned to the juryroom and deliberated another 3 hours before rendering a verdict of guilty.

Never, throughout all of the proceedings in chambers, in open court, and after the verdict was rendered, did any of the defendants or their attorneys voice the slightest objection to the jury procedure. The issue was raised for the first time on appeal. Before this Court the defendants now contend that the district court's allowing the alternate juror to retire to the juryroom and remain there with the twelve regular jurors during part of the deliberations violated their Sixth Amendment right to a trial by a jury of twelve. We disagree.

The defendants do not question that the procedure to be followed was fully explained to them and to the jury in open court, nor do they deny the fact that their attorneys expressly consented and stipulated to, even indicated a preference for, the procedure adopted by the district court. Rather they contend that the stipulation entered into on their behalf by their counsel did not constitute a waiver of their Sixth Amendment rights because they did not *personally* assent to the procedure. Furthermore, they argue that even if their silence during and after the court's explanation of the procedure coupled with the affirmative approval of their attorneys in chambers would in other circumstances constitute a waiver, they were powerless under the Sixth Amendment's mandate to agree to a jury of more than twelve — *i.e.*, that a jury in excess of twelve, even if expressly approved by the defendants, their attorneys, the prosecution and the court, is *per*

se unconstitutional. We need not and do not pass upon the defendants' constitutional arguments. In our view, the defendants were not tried by a jury of thirteen, but rather by a jury composed of twelve members with an alternate observing a portion of the deliberations. The district court expressly instructed the alternate and the jury that the alternate was not to help the jury in any way, not to make any suggestions, not to participate in any vote, and not to do anything except be available in case he was needed. In no sense did Henry have standing as a member of the jury. Indeed, he was discharged after 1 1/2 hours of deliberation and a full 3 hours before the jury rendered its verdict. This analysis of the jury procedure also renders moot the defendants' argument that reversal is required because the mandatory twelve-member jury provision of Fed. R. Crim. P. 23(b) was violated.

The critical issue before us is whether the failure of the district court, in violation of Fed. R. Crim. P. 24(c), to discharge the alternate juror before the jury retired for deliberations and the presence of the alternate during the first one-quarter of the jury's deliberations constitute plain error requiring reversal and a new trial. Admitting that their counsel expressly consented to the alternate observing the jury deliberations and conceding that counsel had every opportunity to object to this procedure both in chambers and in open court when the procedure was explained to the defendants and to the jury, the defendants nevertheless contend that any departure from Rule 24(c) automatically requires a new trial. We not only are of the view that such an automatic rule is an improper standard to

apply to the situation here at issue, but also find the authority, upon which the defendants so heavily rely, for this proposition — *United States v. Beasley*, 10 Cir. 1972, 464 F.2d 468, and *United States v. Virginia Erection Corp.*, 4 Cir. 1964, 335 F.2d 868 — to be factually distinguishable from the case *sub judice*.

In *Virginia Erection*, a new trial was necessitated by a combination of procedural irregularities which are not present in the instant case. First of all the alternate was instructed "to say nothing unless one of the regular jurors should become ill or 'disqualified.'" 335 F.2d at 870. The Fourth Circuit reasoned that the district court by this instruction had apparently delegated to the alternate and to the ill juror the strictly judicial functions of "determining disqualification of a regular juror and ordering replacement by an alternate." *Id.* at 871-872. Additionally, when it came to the attention of the trial judge that one of the jurors might be unduly prejudiced, he called the juror into his chambers and, "in the presence of all counsel, the court reporter, a deputy marshal and a notary public," *id.* at 872, extensively interrogated her. After reviewing these proceedings, the Fourth Circuit concluded that "[t]here exists the grave danger that the interrogation of Miss Furr may have operated as a restraint upon her freedom to function as a juror." *Id.* at 873.

Unlike the present case, no one in *United States v. Beasley* consented to the alternate accompanying the jury during deliberations. After the trial to the jury had been concluded and the jury instructed, the court

simply failed to discharge the alternate. Without the parties' or the court's knowledge, the alternate went along with the jury as it retired for deliberations, "participated in the vote to elect a foreman, and voted to go to lunch." 464 F.2d at 469. After the trial judge realized that the alternate had not been discharged, the court was reconvened and the attorneys were advised of what had happened. Immediately, the defense counsel moved for a mistrial. "The court then held a brief hearing to determine the extent the alternate had participated. At the conclusion of this hearing the motion for mistrial was denied." *Id.* The Tenth Circuit reversed, holding that "[o]nce the prescribed number of jurors becomes 'the jury,' then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury and a mistrial is necessary." *Id.* at 470.

While we might agree that under the circumstances of *Beasley* and of *Virginia Erection* a mistrial was necessary, we are not persuaded that the alternate's presence during deliberations in the limited circumstances of the present case automatically requires the granting of a new trial. In *Beasley* counsel had not stipulated to the procedure and the alternate had not been instructed *not to participate* in any way. On the contrary, the alternate did participate in electing the foreman and counsel made a timely motion for a mistrial. In *Virginia Erection*, the alternate had not been instructed not to say anything or to do anything other than "just be there in case *we* need you." Instead, the court's instruction apparently gave the alternate and ill juror the authority to decide when the alternate

was needed. Furthermore, regardless of the presence of the alternate during jury deliberations, the new trial was, in the circumstances of that case, required by the trial court's interrogation of one of the jurors.

The provision of Rule 24(c) that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict" is a mandatory requirement that should be scrupulously followed. Because any benefit to be derived from deviating from the Rule is unclear and the possibility of prejudice so great, it is foolhardy to depart from the explicit command of Rule 24. Moreover, there is no rule providing that the parties, or the district court, may stipulate that an alternate be present during the jury's deliberations. Nevertheless, given the unique posture of the present case — where the parties stipulated and urged upon the court that the alternate be allowed to sit-in on the jury deliberations, and the alternate was expressly instructed not to participate in any way, not to say anything, not to vote, or otherwise do anything except be available in case the court found it necessary to substitute him for the ill juror — we are convinced that a new trial is not required unless on remand it is shown that there is a reasonable possibility that the presence of the alternate affected the jury's verdict. *See United States v. Nash*, 2 Cir. 1969, 414 F.2d 234, *cert. denied*, 396 U.S. 940; *United States v. Hayutin*, 2 Cir. 1968, 398 F.2d 944, *cert. denied*, 393 U.S. 1097; *see also Lesser v. United States*, 9 Cir. 1966, 358 F.2d 313.

Given the peculiar facts of this case, if the alternate in fact abided by the court's instructions to remain orally silent and not to otherwise indicate his views or attitude — in writing, by facial expressions, gestures, or the like — and if the presence of the alternate did not operate as a restraint upon the regular jurors' freedom of expression and action, we see little substantive difference between the presence of a mute (orally and otherwise) alternate during jury deliberations and the presence in the juryroom of an unexamined book which had not been admitted into evidence. *See Paz v. United States*, 5 Cir. 1973, ____ F.2d ____ [No. 28997, Feb. 12, 1973]; *Paz v. United States*, 5 Cir. 1972, 462 F.2d 740; *United States v. Staples*, 5 Cir. 1971, 445 F.2d 863, *cert. denied*, 1972, 404 U.S. 1048; *Farese v. United States*, 5 Cir. 1970, 428 F.2d 178. On the other hand, sufficient prejudice and effect on the jury's verdict would be shown and, therefore, a new trial required if the alternate disobeyed the court's instructions and in any way participated in the jury deliberations, or if any regular juror was deterred in the free exercise of his independence of thought, expression, or action by the mere presence of a non-participating alternate during deliberations.

In framing relief "which will give due regard to the rights of the appellants, will likewise accord to the government an opportunity to preserve a fair conviction if no prejudice is shown, and which may thus avoid the necessity of another trial," we follow the procedure outlined in *United States v. Barson*, 5 Cir. 1970, 434 F.2d 127, 131, and in *Paz v. United States*, 5 Cir. 1972, 462 F.2d 740, 746. We remand to the court below with

directions to conduct an evidentiary hearing to determine whether the alternate participated in any way in the deliberations; whether he took part in any votes of the jury; whether he indicated his views regarding any of the defendants in any way — orally or otherwise; and whether the mere presence of the alternate restrained any of the regular jurors in expressing his views or in exercising his independence of thought and action. The district court shall make and certify to this Court findings of fact and conclusions of law together with a transcript of the proceedings. Our determination whether to affirm the judgments of conviction or to reverse for a new trial will follow such certification. Jurisdiction of the appeal is retained in this Court during the limited remand for the purpose stated.

At oral argument counsel for defendants obliquely raised the issue whether the absence of the defendants from chambers when the stipulation regarding the alternate juror was entered into violated the defendants' right, under the Sixth Amendment and Fed. R. Crim. P. 43, to be present at every stage of their trial. Although many conferences in chambers may be regarded as a stage of the trial at which defendants have the right to be present, *see, e.g., McKissick v. United States*, 5 Cir. 1967, 379 F.2d 754, the meeting here in question was not such a stage: (1) it was in the nature of a conference on a point of law; (2) the jury procedure adopted by the court as a result of the conference was urged by defense counsel and agreed to, without objection, by the defendants through their attorneys; and (3) in any event, no prejudice resulted from the

defendants' absence since after the conference the procedure was fully explained to the defendants, accompanied by their attorneys, in open court with ample opportunity for objection. *See United States v. Sinclair*, 5 Cir. 1971, 438 F.2d 50; *United States v. Gradsky*, 5 Cir. 1970, 434 F.2d 880, *cert. denied*, 1971, 401 U.S. 925; *United States v. Lewis*, 5 Cir. 1970, 420 F.2d 686; *Pope v. United States*, W. D. Texas 1967, 287 F.Supp. 214, *aff'd per curiam*, 5 Cir. 1968, 398 F.2d 834, *cert. denied*, 1969, 393 U.S. 1097; *cf. United States v. Garafolo*, 7 Cir. 1967, 385 F.2d 200, *vacated on other grounds*, 1968, 390 U.S. 144.

Finally, we have carefully reviewed the record and find to be without merit the contentions of defendant Michael Marquez regarding (1) the denial of his motions *in limine*, for severance and for a continuance, (2) the misconduct on the part of the United States Attorney, (3) the admission, without objection, of statements of the co-conspirators, and (4) the sufficiency of the evidence.

The cause is remanded for the limited purpose of holding an evidentiary hearing as directed herein. Jurisdiction of the appeal is otherwise retained.

REMANDED WITH DIRECTIONS.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2828

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARLTON ELLIS ALLISON, BILLY RAY HOLLADAY, RALPH M. MARQUEZ, JERRY RONALD BRYANT, DONALD GEORGE ROBINSON, CURTIS ALDREDGE PERRY and MICHAEL MARQUEZ,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama

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(November 13, 1973)

Before BROWN, Chief Judge, COLEMAN and DYER, Circuit Judges.

PER CURIAM: This Dyer Act case was remanded to the district court for a limited post-trial hearing to determine whether there is a reasonable possibility that the presence of the alternate juror during the jury's deliberations affected the jury's verdict. The

factual circumstances requiring the remand order and the directions given to the district court for an evidentiary hearing appear in our prior opinion, *United States v. Carlton Ellis Allison, etc.*, 5 Cir. 1973, ____ F.2d ____ No. 72-2828, July 13, 1973.

The trial judge has conducted an evidentiary hearing, the transcript thereof and the court's findings and conclusions have been certified to us. The parties were requested to but have declined to file briefs on the remand issue. In the hearing each juror and the alternate was interrogated out of the presence of the other jurors. Following the hearing the trial judge entered an order containing detailed findings of fact and conclusions of law.

The procedures followed by the trial judge and the standards employed by him complied with our remand directions. We find no error in the trial judge's conclusion that there is no reasonable possibility that the presence of the alternate juror during the jury's deliberations affected the verdict.

The findings and conclusions of the district court on remand are Affirmed. This requires that the convictions be, and they hereby are

AFFIRMED.

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SUPREME COURT, U. S.

No. 73-925

FILED
APR 17 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

CARLTON ELLIS ALLISON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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CARLTON ELLIS ALLISON, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSTION

Petitioners contend that the trial court committed reversible error in allowing an alternate juror to remain with the twelve regular jurors during a portion of the jury's deliberations.

After a jury trial in the United States District Court for the Northern District of Alabama, petitioners were all convicted of conspiring to transport, receive, and sell stolen motor vehicles, in violation of 18 U.S.C. 371, 2312 and 2313. In addition, petitioners Allison, Holladay, and Perry were convicted on single counts of selling or receiving stolen motor vehicles in interstate commerce, in violation of 18 U.S.C. 2313, and petitioners Ralph Marquez and Michael Marquez were convicted on single counts charging interstate transportation of

stolen motor vehicles, in violation of 18 U.S.C. 2312.[1] On appeal, the court of appeals remanded the case for the purpose of holding an evidentiary hearing as to whether there was "a reasonable possibility that the presence of * * * [an] alternate [juror] affected the jury's verdict" (Pet. App. A, p. 8). After the hearing, the trial judge concluded, in an order containing detailed findings of fact and conclusions of law, that the presence of the alternate juror had not affected the jury's deliberations ~~of~~ verdict. The court of appeals affirmed *per curiam* (Pet. App. B).

After a trial lasting almost three weeks, the court convened on August 4, 1972, to charge the jury. At that time, the court, in chambers, informed all of the attorneys involved in the trial that one of the jurors, Mr. Finch, had been ill during the preceding night, but that he felt he would be able to continue (Tr. 2926).[2] The court suggested that the best procedure might be to keep the alternate juror, Mr. Henry, away from the jury but available in the event that it became necessary to excuse the ill juror. The court alternatively suggested that the alternate juror could be allowed to sit in the jury room with instructions not to participate in any way, or that counsel might stipulate that the jury

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[1]Each petitioner was convicted on a total of two counts. Petitioners Allison, Holladay, Ralph Marquez, and Michael Marquez were sentenced to concurrent terms of three years' imprisonment; petitioner Perry was sentenced to concurrent terms of five years' imprisonment.

[2]"Tr." refers to the transcript of the trial. "H.Tr." refers to the one volume transcript of the evidentiary hearing on remand, a copy of which we are lodging with the Clerk.

could proceed so long as eleven jurors remained (Tr. 2927). Counsel for petitioner Ralph Marquez preferred that the alternate juror be allowed to sit with the jury (Tr. 2927-2928). The prosecutor suggested that the ailing juror be excused, but neither the trial judge nor defense counsel felt that the juror's condition was so serious as to warrant his discharge (Tr. 2928). Another defense attorney indicated that he preferred that the alternate sit with the regular jurors with instructions not to participate in the deliberations (Tr. 2929). None of the defense attorneys objected to this latter procedure.

In the courtroom, in the presence of all the parties and the jury, the court gave the following instruction (Tr. 2930-2931):

> THE COURT: Now, Mr. Henry, you are the alternate juror in this case. And just in case Mr. Finch is not feeling well enough to continue during the morning, I am going to keep you here with the jury. I am required to instruct you and the jury that during the deliberations that you are not to participate in any way. You are not to make any suggestions or you are not to help them in any way. Just be there in case we need you.
>
> MR. HENRY: Yes, sir.
>
> THE COURT: And, of course, you realize you would not participate in any vote or do anything other than just be availabe.
>
> MR. HENRY: Yes, sir.
>
> THE COURT: You would hear whatever is said and you would be up to date, but that's all.

MR. HENRY: Yes, sir.

Petitioners made no objection to the procedure or to the instruction.

The jury was then charged. At 10:20 a.m. the jury retired to deliberate, with the alternate juror sitting with them. They went to lunch at 11:55 a.m. and returned at 1:30 p.m. At that time it appeared that the previously ailing juror was feeling well and would be able to complete the deliberations. The alternate juror was then excused. After three more hours of deliberation the jury returned verdicts of guilty. At the hearing on remand, each of the jurors and the alternate was questioned out of the presence of the others.[3] Each juror testified that the alternate had taken no part in the deliberations or in any vote, and that he had not indicated his views regarding any of the defendants either orally, in writing, by facial expression, or by gestures (H. Tr. 38-39, 45, 51-52, 59, 65-66, 71-73, 77-78, 82, 87, 91, 95-96, 100-101, 104-105). Each juror testified that the alternate's presence did not restrain him in any way in expressing his views or in exercising his independence of thought and action (H. Tr. 46, 52, 59, 66, 73, 78, 82, 87-88, 91-92, 96, 101, 105). The alternate juror testified that he sat in a corner and listened but in no way participated in the deliberations (H. Tr. 39-40). The foreman of the jury testified that the alternate juror did nothing that would affect any other member of the jury in any way

[3]Prior to the examination of the jurors the trial judge solicited suggestions from counsel for petitioners as to questions that should be asked other than those outlined by the court of appeals. No questions were suggested concerning the alternate juror's presence during deliberations. The attorney for petitioner Ralph Marquez requested and was allowed to ask a question of the previously ailing juror, Mr. Finch (H. Tr. 84).

(H. Tr. 52). The trial judge concluded "that there is not a reasonable possibility that the verdict of any juror was affected by the fact that Mr. Henry, the alternate juror, was present during part of the jury's deliberations" (Findings of Fact, Conclusions of Law and Order, at 4).

Petitioners contend that while Rule 23(b), Fed. R. Crim. P., provides for trial by a jury of less than twelve when stipulated by the parties, the parties cannot stipulate to a jury of more than that number, and that the jury here was composed of more than twelve. The record belies this claim. The alternate was instructed not to participate in the deliberations in any fashion and he followed those instructions to the letter. Moreover, he was present with the jury for only the first one-third of their deliberations. The court below properly found, even prior to the hearing on remand, that petitioners were, in fact, tried by "a jury composed of twelve members with an alternate observing a portion of the deliberations" (Pet. App. A, p. 5).

Nor does the failure to follow Rule 24(c), Fed. R. Crim. P.,[4] require reversal in this case. Petitioner's reliance on *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (C.A. 4), is misplaced. As the court below noted (Pet. App. A, pp. 6-8):

> In *Virginia Erection*, a new trial was necessitated by a combination of procedural irregularities which are not present in the instant case. First of all the alternate was instructed "to say nothing unless one of the regular jurors should become ill or

[4]Rule 24(c), Fed. R. Crim. P., provides in relevant part that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

> 'disqualified,'" 335 F.2d at 870. The Fourth Circuit reasoned that the district court by this instruction had apparently delegated to the alternate and to the ill juror the strictly judicial functions of "determining disqualification of a regular juror and ordering replacement by an alternate." *Id.* at 871-872. Additionally, when it came to the attention of the trial judge that one of the jurors might be unduly prejudiced, he called the juror into his chambers and, "in the presence of all counsel, the court reporter, a deputy marshal and notary public," *id.* at 872, extensively interrogated her. After reviewing these proceedings, the Fourth Circuit concluded that "[t]here exists the grave danger that the interrogation of Miss Furr may have operated as a restraint upon her freedom to function as a juror." *Id.* at 873.
>
> * * * * *
>
> In *Virginia Erection,* the alternate had not been instructed not to say anything or to do anything other than "just be there in case *we* need you." Instead, the court's instruction apparently gave the alternate and ill juror the authority to decide when the alternate was needed. Furthermore, regardless of the presence of the alternate during jury deliberations, the new trial was, in the circumstances of that case, required by the trial court's interrogation of one of the jurors. [Emphasis in original.]

Moreover, the court in *Virginia Erection* noted that the alternate juror had been present throughout the jury's deliberations, and might have conveyed his attitude through facial expressions or gestures, thereby influencing one or more of the jurors. 335 F. 2d at 872. The possibility

that the alternate's presence may have operated as a restraint upon the juror's freedom of action or expression was also noted. *Ibid.* These possibilities were recognized by the court below and inquiry was made precisely about them at the evidentiary hearing. After the hearing, the district court found that the alternate had not communicated his own attitude to the other jurors and that his presence had not operated as a restraint upon any juror's freedom of action or expression.

Relying on *United States* v. *Beasley*, 464 F.2d 468 (C.A. 10), petitioners contend that the holding of an evidentiary hearing was itself improper. The facts in *Beasley*, however, were very different. There the alternate had retired for deliberations with the jury without the knowledge of the parties or the court, so that the deliberations were begun with thirteen jurors—not, as in this case, with twelve jurors and an alternate who had been instructed not to participate. When the parties became aware that the alternate had not been discharged, defense counsel moved for a mistrial. A hearing was held to determine the extent of the alternate's participation, after which the motion was denied. On appeal, the court of appeals held that the motion for a mistrial should have been granted without a hearing, reasoning that the hearing constituted "a dangerous intrusion into the proceedings of the jury." *Id.* at 470. No such intrusion or interference was caused by the hearing here, which was conducted after the jury's deliberations had concluded.

It might have been a better practice for the court to have excused the ailing juror prior to the jury's deliberation, as suggested by the prosecutor, or for the parties to have stipulated that, if necessary, they would proceed with a jury of less than twelve, as provided in Rule 23(b), Fed. R. Crim. P. However, the course taken here was at the request, and with the consent, of counsel for at least two of the petitioners, with the apparent acquiescence of all other defense counsel, and petitioners therefore have waived any objections to it. Moreover, as the hearing disclosed, the verdict was not in any event affected by the alternate's presence in the jury room, and any error was therefore harmless.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[5]Petitioners declined the request of the court below to file briefs on the remand issue (Pet. App. B, p. 2). An issue not raised below, particularly after a request to address that issue, should not be considered by this Court. *Tacon* v. *Arizona*, 410 U.S. 351; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2.